Calendar No. 692

100TH CONGRESS
2d Session

SENATE

REPORT
100-361

THE RECORD RENTAL AMENDMENT ACT

MAY 25 (legislative day, MAY 18), 1988.—Ordered to be printed

Mr. BYRD (for Mr. BIDEN) from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 2201]

The Committee on the Judiciary, to which was referred the bill (S. 2201) to make certain provisions relating to the commercial rental of phonorecords of sound recordings and of musicial works a permanent part of the Copyright Act, having considered the same, reports favorably thereon and recommends that the bill do pass.

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I. PURPOSE

The purpose of S. 2201 is to make permanent the provisions of the Record Rental Amendment of 1984, Public Law 98-450. The 1984 measure amended section 109(a) of title 17 of the United States Code to provide that, unless authorized by owners of copyright in the sound recording and in the musical works therein, the owner of a particular phonorecord may not, for purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that phonorecord by any activity or practice in the nature of rental, lease or lending. Noncommercial lend-

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ing by nonprofit libraries or nonprofit educational institutions is not affected.[1]

In 1984 the Judiciary Committee unanimously reported a version of the Record Rental Amendment that would have made the record rental provisions a permanent part of the law upon enactment of that bill. The version finally enacted, however, contained a sunset provision that will cause the record rental provisions to expire in 1989. The committee has concluded that continuation of these provisions as a permanent part of the law is justified because they have proved to be a fair and workable solution to the record rental problem, and is necessary because, absent these provisions, the record rental phenomenon likely would flourish at the expense of copyright owners, consumers and retail record stores.

II. Legislative History

The record rental proposal was first introduced by Senator Mathias in the 97th Congress as Amendment No. 1333 to S. 1758. A hearing was held before the Judiciary Committee on April 21, 1982, but no action was taken. Senator Mathias introduced S. 32, in the 98th Congress. The Subcommittee on Patents, Copyrights and Trademarks had a hearing on S. 32 on April 29, 1983. A variety of witnesses testified in favor of the proposal at this hearing. The proposal was supported by all segments of the music industry.

The Senate Judiciary Committee approved S. 32 on June 16, 1983. The Senate passed S. 32 by voice vote on June 28, 1983, and became Public Law 98–450 on October 4, 1983.

Senator DeConcini, for himself, Mr. Hatch, Mr. Leahy, Mr. Heflin, Mr. Simpson, and Mr. Grassley, introduced S. 2201 on March 21, 1988. S. 2201 was approved by the Subcommittee on Patents, Copyrights and Trademarks on April 13, 1988. It was approved by voice vote of the full Judiciary Committee on April 14, 1988.

III. Discussion

Prior to enactment of the Record Rental Amendment of 1984, commercial record rentals were a rapidly growing practice in the United States. This committee's report accompanying the 1984 legislation observed that, as of 1983, there were already several hundred rental shops in this country, all of which had sprung up in a period of less than 2 years.

The rapid growth of commercial record rentals [2] in the United States threatened to create a problem of the proportion already existing in Japan at that time. In that country, there were more than 1,700 record rental outlets by 1983, and surveys showed that more than 97 percent of these outlets' customers admitted that they taped the albums that they rented. The committee was informed

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[1] The 1984 measure also authorized a conforming amendment to the compulsory licensing provisions of section 115 of title 17; included certain amendments to the Clayton Act and the Federal Trade Commission Act; and provided that criminal penalties shall not be applicable to violations of the record rental provisions.

[2] The committee reemphasizes that the record rental provisions do not affect noncommercial lending by nonprofit libraries or nonprofit educational institutions. The legislation is not intended to interfere with these institutions' customary lending practices, provided they are not in the nature of commercial record rentals.

that record sales by rental stores located in the vicinity of rental outlets had fallen by 30 percent.

American rental outlets that were operating at the time of the 1984 amendment featured a number of different rental schemes. Typically, a customer could select from a wide variety of records and CD's, including current hits. The customer could rent the record for a day or a whole weekend, at rates ranging from 99 cents to $2.50 per record. For the customer's convenience, most of the shops also stocked blank cassette tapes, sometimes at a discount.

The clear purpose of these arrangements was to permit and encourage customers to tape rented records instead of buying them. Indeed, one advertisement for a record rental shop suggested, "Never, ever buy another record!!" The committee found that record rentals were directly displacing record sales.

The committee concluded in 1984, and continues to believe, that this displacement of sales injures copyright owners and creators. Record companies derive a significant percentage of their income from actual record sales. These companies lose revenues when their records are rented and taped instead of purchased. And artists, songwriters and music publishers, all of whose livelihoods are significantly dependent on record sales, lose royalties.

Moreover, the committee adheres to the conclusion it also reached in 1984 that uncompensated record rentals are contrary to consumers' interests. As record sales drop because of the rental phenomenon, record companies will be forced to spread their production costs over the smaller number of records sold. Inevitably, the practice of renting records will cause the price of records to increase—in effect forcing legitimate purchasers to subsidize those who tape rented records.

Legitimate record retailers are also hurt by rental practices. Their record prices include royalties for copyright owners. They cannot fairly compete with those rental outlets that evade such royalty obligations.

These serious concerns led to the 1984 enactment of the Record Rental Amendment which made it unlawful to rent, lend, or lease a phonorecord for commercial purposes without the copyright owner's permission. That amendment effectively brought the record rental problem under control in the United States. There can be no doubt that renewal is appropriate and necessary at this time. The growth of the market for compact discs—digital sound carriers that withstand wear and damage so effectively that they could be rented over and over, thousands of times—makes the business of record rentals even more attractive than before. Without this legislation, record rental stores would almost certainly spring up everywhere and displace legitimate record sales and unfairly drain revenues from the American musical community. The laudable and substantial accomplishments of the 1984 amendments would be entirely eroded.

Nor is there any doubt that the provision should now become a permanent part of the law. Indeed, when this committee considered the Record Rental Amendment of 1984, it determined that the record rental provisions should become a permanent part of the law, and reported a bill that so provided. The House Committee on

the Judiciary, however, reported a bill that included a 5-year sunset provision to preserve an opportunity for later evaluation of the appropriateness of and justification for the record rental provisions.

The legislation has proved in the intervening years to be a fair and effective way of dealing with the record rental problem. Given the present availability of highly durable, and therefore highly "rentable," media such as CD's, and considering that the "experiment" of the last 4 years has worked, the committee believes that it is necessary and appropriate to make the record rental provisions a permanent feature of the copyright laws.

IV. Vote of the Committee

On April 13, 1988, the Subcommittee on Patents, Copyrights and Trademarks, a quorum being present, reported S. 2201 to the full Judiciary Committee without objection.

On April 14, 1988, the Committee on the Judiciary, a quorum being present, unanimously agreed to report S. 2201, to make permanent the provisions of the Record Rental Amendment of 1984.

V. Text of S. 2201

[S. 2201, 100th Cong., 2d Sess.]

A BILL To make certain record rental provisions in title 17, United States Code, the Copyright Act, permanent

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 4(c) of the Record Rental Amendment of 1984 (98 Stat. 1727; 17 U.S.C. 109 note) is repealed.

VI. Section-by-Section Analysis

S. 2201 consists of a single sentence. That sentence repeals the sunset provision of the Record Rental Amendment of 1984, which is currently codified as a note to section 109 of title 17.

The effect of S. 2201 is to continue the Record Rental Amendment of 1984 as a permanent part of the Copyright Act. The 1984 amendment's section-by-section analysis is set out in full at S. Rep. No. 162, 98th Cong., 1st Sess. 5–7 (1984), and H.R. Rep. No. 987, 98th Cong., 1st Sess. 4–6 (1984).

VII. Cost Estimate

In accordance with paragraph 11(a), Rule XXVI, of the Standing Rules of the Senate, the committee offers the Report of the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, DC, April 21, 1988.

Hon. Joseph R. Biden, Jr.,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 2201, a bill to make certain record rental provisions in

title 17, United States Code, the Copyright Act, permanent, as ordered reported by the Senate Committee on the Judiciary, April 14, 1988. We expect that enactment of the bill would not result in any additional cost to the federal government.

S. 2201 would make permanent an amendment to the Copyright Act that prohibits the rental of any phonorecord that could be copied, unless authorized by the owner of the copyrighted material. Under current law, the amendment will expire on October 4, 1989. Because there are no administrative or enforcement costs associated with implementing this bill, we expect that no additional cost to the federal government would result.

No costs would be incurred by state or local governments as a result of enactment of this bill.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

C.G. NUCKOLS
(For James L. Blum, Acting Director).

VIII. REGULATORY IMPACT STATEMENT

Pursuant to paragraph 11(b), Rule XXVI of the Standing Rules of the Senate, the committee, after due consideration, concludes that the Act will not have direct regulatory impact.

IX. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of Rule XXVI, of the Standing Rules of the Senate, changes in existing law made by S. 2201 as reported are as follows:

The sole change effected by S. 2201 is to strike subsection (c) of the note titled "Effective and Termination Dates of 1984 Amendment," which follows section 109 of title 17, United States Code. Subsection (c), shown here in brackets to denote that it will be deleted, reads as follows:

"(c) The amendments made by this act [amending sections 109 and 115 of this title and enacting provisions set out as a note under section 101 of this title] shall not apply to rentals, leasing, lendings (or acts or practices in the nature of rentals, leasings, or lendings) occurring after the date which is five years after the date of the enactment of this Act [Oct. 4, 1984]."

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Calendar No. 698

100TH CONGRESS
2d Session

SENATE

REPORT
100-365

EXEMPTING CERTAIN ACTIVITIES FROM PROVISIONS OF THE ANTITRUST LAWS

MAY 27 (legislative day, MAY 18), 1988.—Ordered to be printed

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Mr. BYRD (for Mr. BIDEN), from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 844]

The Committee on the Judiciary, to which was referred the bill (S. 844) to exempt certain activities from provisions of the antitrust laws, a quorum being present, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

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I. PURPOSE

S. 844 grants the television industry an exemption from the antitrust laws that is carefully limited both in time and scope. The bill permits, but does not require, certain parties in the industry to act jointly during a period of 36 months from the date the bill is en-

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acted for the narrow purpose of developing and disseminating voluntary guidelines designed to alleviate the negative impact of televised violence on children and adults.

The existence of harmful effects from televised violence is well-documented. Among others, the National Institute for Mental Health, the Surgeon General, the American Psychological Association, the American Psychiatric Association and the American Academy of Pediatrics have all found that television violence is linked to negative and aggressive behavior. The same conclusions were presented by witnesses at the committee's June 25, 1987, hearing on S. 844, at the committee's June 20, 1986 hearing on S. 2323 (a predecessor bill), and during an oversight hearing on the subject of televised violence held by the former Juvenile Justice Subcommittee on October 25, 1984.

Industry spokespersons state that the television industry's uncertainty about liability under the antitrust laws prevents it from undertaking the beneficial joint activity authorized by this legislation. S. 844 removes this federally placed obstacle and allows the industry to use its considerable collective resources to address a serious problem. Simply stated, S. 844 grants the immunity from antitrust challenge that the committee has determined is appropriate for concerted action in this area.

II. LEGISLATIVE HISTORY

On April 17, 1986, Senator Sam Simon introduced in the 99th Congress S. 2323, a predecessor bill to S. 844, the Television Violence Act. S. 2323 was referred to the Committee on the Judiciary. On June 20, 1986, the Judiciary Committee held a hearing, during which the need for the legislation was established. On September 19, 1986, a quorum being present, the committee ordered that S. 2323 be reported favorably with an amendment in the nature of a substitute offered by Senator Simon. The bill was reported to the Senate (without a written report) by Senator Thurmond on September 24, 1986 with an amendment in the nature of a substitute. It was placed on the Senate Legislative Calendar under General Orders. S. 2323 passed the Senate by voice vote on October 3, 1986. On October 8, 1986, Senator Thurmond filed the written report, Report No. 99-535. No further action was taken, as the House of Representatives did not act by the time the 99th Congress adjourned.

Senator Simon introduced S. 844 on March 25, 1987. It was referred to the Committee on the Judiciary and then referred to the Subcommittee on Antitrust, Monopolies and Business Rights. On June 25, 1987, the subcommittee held a hearing to examine the incidence and effects of television violence and the constitutionality of the bill. S. 844 was unanimously polled out of the subcommittee on October 28, 1987 and reported favorably to the full committee.

While S. 844 was pending in the committee, the Justice Department recommended a number of technical changes. First, as originally drafted, Sec. 1(a) of the bill stated that the actions would be exempt from "certain provisions" of the antitrust laws of the United States. The Justice Department found that this was potentially confusing and proposed eliminating the phrase "certain pro-

visions." Second, the department believed that the terms "chief executive officer," "presidents" and "designees" in Section 1(b)(2) would be too limiting. Third, the department suggested substituting "discussion, consideration, review" for "understanding" in Section 3(a), and proposed substituting "apply only to activities conducted within 36 months" for "terminates on the date" in Section 3(b) as a way of avoiding springing liability. The committee agreed with the proposed revisions.

III. DISCUSSION

A. The need for an antitrust exemption

A principal reason that the television industry is reluctant to undertake the joint action authorized by S. 844 is concern about potential antitrust liability. This concern arises from a complaint filed by the Justice Department against the National Association of Broadcasters ("NAB") in 1979. See *United States* v. *National Ass'n of Broadcasters,* 536 F. Supp. 149 (D.D.C. 1982). In this action, the department alleged that the NAB violated section 1 of the Sherman Act, 15 U.S.C. Section 1, by its adoption and enforcement of certain standards that regulated television advertising. These standards were part of the NAB's "Television Code," to which most of the Nation's television stations subscribed. While subscription to the Code was voluntary, the NAB administered a comprehensive monitoring and enforcement program through its "Code Authority;" the NAB punished violators of the Code by prohibiting them from displaying the NAB Seal of Good Practice.

The challenged provisions of the Code imposed limitations on the number of minutes per hour a network or station could allocate to commercials, the number of commercials that could be broadcast per hour of television time and the number of products that could be advertised on certain types of commercials (which the court called the "multiple product standards"). On cross-motions for summary judgment, the court found the "multiple product standards" to be a per se violation of the Sherman Act because, inter alia, the standards constituted a horizontal agreement among competitors to restrict the output of television time available for commercials. The parties subsequently entered into a consent decree whereby NAB agreed to stop disseminating or enforcing all of the three challenged standards. The final judgment entered pursuant to the decree remains in effect for 10 years from the date of entry. Since entering into the consent decree, NAB has completely discontinued the use of its Television Code, even though only relatively small parts of it were declared invalid.

As the *NAB* case demonstrates, collective self-regulatory measures undertaken by competitors can be regarded under antitrust law as unreasonable horizontal restraints of trade. Furthermore, under current antitrust laws, any social benefits created by such collective efforts but not related to competition (such as a reduction in the level of violence) would not be cognizable as a legal justification for anticompetitive conduct. See *National Society of Professional Engineers* v. *United States,* 435 U.S. 679 (1978). Therefore, there are grounds for concern among members of the television industry

who might otherwise engage in collective discussions regarding the effects of violence in broadcasts.

The committee appreciates that prudent antitrust counsel, in light of the *NAB* case, might caution a client in the television industry against participation in the joint activity authority by S. 844. In approving S. 844, the committee has determined that actions permitted by the exemption further an important social purpose—the alleviation of the harmful effects, particularly on children, of televised violence—to which an agreement among television industry competitors may be ancillary.

It is noted in the 1986 hearing record that each of the three major over-the-air commercial television networks (NBC, CBS and CapCities/ABC) maintain broadcast standards departments, whose responsibilities include screening all program material prior to broadcast and removing scenes they deem to be objectionable. Additionally, it is noted that cable industry representatives testified that cable offers a variety of programs for children, and provides its viewers with monthly guides so that adults may make informed choices. These efforts should be commended. But while they furnish important safeguards against the harmful effects of televised violence, more must be done.

The exemption does not authorize the creation of an enforcement authority similar to the NAB's Code Authority. It does not permit the implementation of any joint sanction or of a boycott by any of the parties covered by the exemption. It does not require participation in any activity authorized by the legislation. It simply removes a federally-imposed obstacle to the development and dissemination of voluntary guidelines the members of the industry may, in their individual judgments, elect to follow.

B. The harmful effects of televised violence

In the early 1950's, televisions could be found in only 50 percent of American households. By 1954, the Senate Subcommittee on Juvenile Delinquency had conducted the first examination of the possible harmful effects of television violence. During the ensuing years, numerous hearings have been held and studies on televised violence have been written from every perspective. Psychologists, sociologists, industry representatives and government agencies—among others—produced volumes of data on the subject. An overwhelming majority of these studies suggest a causal connecton between violence on television and negative attitudes and behavior.

For example, a 1972 report by the National Institute of Mental Health ("NIMH"), conducted for the Surgeon General's Scientific Advisory Committee, concluded that a link appeared to exist between violence on television and aggressive behavior. The report also stated that additional studies were required.

In 1982, NIMH published an analysis of studies of television violence conducted after its 1972 Report was issued. In testimony on the 1982 NIMH study before the Juvenile Justice Subcommittee, a spokesman for NIMH confirmed that—

> A sizable number of studies did support the inference that there was a causal connection between the viewing of televised violence and later aggressive behavior.

Other studies have reached similar conclusions. The report of the U.S. Attorney General's 1984 Task Force on Family Violence concluded:

> Evidence is becoming overwhelming that, just as witnessing violence in the home may contribute to normal adults and children learning and acting out violent behavior, violence on television . . . may contribute to the same result.

In February 1986, the American Psychological Association passed a resolution stating:

> The conclusion drawn on the basis of 25 years of research and the sizable number of experimental and field investigations is that viewing televised violence may lead to increases in aggressive attitudes, values, and behavior, particularly in children.

The American Psychiatric Association and the American Medical Assocation both passed resolutions declaring that television violence is a risk factor which threatens the health and welfare of young Americans. The American Academy of Pediatrics' Policy Statement on Children, Adolescents and Television found:

> Repeated exposure to televised violence promotes a proclivity to violence and a passive response to its practice. (1985)

Many researchers have reached conclusions consistent with these views. Jerome and Dorothy Singer, professors at Yale University, for example, found that 3- and 4-year-old children who are heavy viewers of violent programs also engaged in unwarranted aggressive behavior while playing during free time in a day care setting. Singer and Singer, "Television Viewing and Aggressive Behavior in Preschool Children: A Field Study," 347 Forensic Psychology and Psychiatry 289–303 (1980). George Gerbner, professor at the University of Pennsylvania, in an ongoing study, has found that extensive exposure to television leads viewers to become more distrustful. Gerbner, Bross, Signiorelli, "Television's Mean World: Violence Profile No. 14–15," Annenberg School of Communications (1986). According to other researchers, children who watch television may become more tolerant of aggressive behavior and perceive such behavior as acceptable. Drabman and Thomas, "Does Media Violence Increase Children's Toleration of Real-life Aggression?" 10 Developmental Psychology 418–421 (1974).

The committee finds persuasive the growing body of evidence concluding that television violence contributes to aggressive and destructive behavior. Thus, the committee concludes that a demonstrable need exists for the joint activity permitted by S. 844.

C. Constitutionality

Questions have been raised about the constitutionality of S. 844. In response to these concerns, the committee solicited the written opinion of a number of constitutional scholars and invited constitutional experts to testify at the hearing on June 25, 1987. The committee has concluded that although any direct attempt by the Fed-

eral Government to regulate the content of television programming would present serious First Amendment problems, S. 844 presents no such threat to freedom of speech or artistic expression and does not violate the First Amendment.

The committee believes that S. 844 is not a restriction on speech. Rather, the purpose of S. 844 is to remove a federally-placed obstacle—the potential application of the antitrust laws—to private discussions within the television industry concerning ways to alleviate the negative impact of television violence. The bill imposes no Federal guidelines. It does not require any network to broadcast anything at any time, nor does it ban any specific program or material.[1] It does not require industry representatives to participate in the development and dissemination of guidelines. Any agreement permitted by the exemption would be strictly voluntary. Each network, each station and each cable service would be free to ignore or adhere to any guidelines developed by the industry. If an industry member chose to ignore such guidelines, no punitive or coercive measures by the FCC or any other government entity are prescribed. As Paul Gewirtz, Professor of Law at Yale Law School, said in a statement submitted to the committee:

> This resulting legal situation—in which no congressional law would either require or prohibit broadcast guidelines—seems fully consistent with the First Amendment, which provides that "Congress shall make no law * * * abridging the freedom of speech."

As noted above, the committee does not believe that S. 844 is a restriction on speech. Even assuming, *arguendo,* that it is a restriction, the hearing record on S. 844 and the advice solicited from constitutional scholars on a predecessor bill contain extensive support for S. 844's constitutionality. A number of Supreme Court decisions also support the bill's constitutionality.

The Court has held on several occasions, for example, that broadcast media may be subject to more government regulation than other form of communication. See *FCC* v. *Pacifica Foundation,* 438 U.S. 726 (1978); *Red Lion Broadcasting* v. *FCC,* 395 U.S. 367 (1969); *CBS* v. *Democratic National Committee,* 412 U.S. 94 (1973). The Supreme Court has also held that regulations designed to alleviate harmful secondary effects of speech on the surrounding community are constitutional. See *City of Renton* v. *Playtime Theatres,* 475 U.S. 41 (1986): *Young* v. *American Mini Theatres,* 427 U.S. 50 (1976). Cass Sunstein, professor of law at the University of Chicago Law School, addressed this point in a letter to the committee supporting S. 844. Professor Sunstein stated that S. 844 would likely be upheld because it is not an effort to supress a particular point of view, but is instead simply an authorization of private agreements to combat the effects of violence.

Finally, Gene Nichol, profesor of law at the Marshall-Wythe School of Law at the College of William and Mary, testified that the Supreme Court has made clear that all constitutionally protect-

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[1] Discussions of a particular program at the hearings on S. 844 or its predecessor bills should be seen only as illustrative of the point being made and not as a suggestion by the committee that the content of such program should be altered.

ed speech is not necessarily treated equally. In a number of cases, the Court has held that attempts to regulate certain types of communication are permissible when an important governmental interest will be served. In *FCC* v. *Pacifica Foundation,* supra, for example, the Court upheld an FCC sanction applied against a radio station for broadcasting George Carlin's "Seven Dirty Words" on a weekday afternoon. The Court found that there was an important government interest in protecting the privacy of the home from unwanted offensive speech and in protecting the young from this type of speech. See also *Renton,* supra, and *Young,* supra.

The committee finds that S. 844 is consistent with the Court's interpretation of the First Amendment in these cases because there is a strong government interest in protecting against the demonstrated negative impact of television violence. S. 844 has been narrowly drafted to address this serious concern.

IV. VOTE OF THE COMMITTEE

On December 3, 1987, with a quorum present, by voice vote, the Committee on the Judiciary approved an amendment in the nature of a substitute and ordered the bill, S. 844, the Television Violence Act, favorably reported.

V. TEXT OF S. 844

[S. 844, 100th Cong., 1st Sess.]

A BILL to exempt certain activities from provisions of the antitrust laws

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) actions specified in section 2 shall be exempt from the antitrust laws of the United States.

(b) For purposes of this Act—

(1) "antitrust laws" has the meaning given such term in the first section of the Clayton Act (15 U.S.C. 12), and shall also include section 5 of the Federal Trade Commission Act (15 U.S.C. 45);

(2) "person in the television industry" means a television network, any entity which produces programming for television distribution, including theatrical motion pictures, the National Cable Television Association, the Association of Independent Television Stations, Inc., the National Association of Broadcasters, the Motion Picture Association of America, and each of the networks' affiliate organizations, and shall include any individual acting on behalf of such person; and

(3) "telecast" means any program broadcast by a television broadcast station or transmitted by a cable television system.

SEC. 2. The antitrust laws shall not apply to any joint discussion, consideration, review, action, or agreement by or among persons in the television industry for the purpose of, and limited to developing and disseminating voluntary guidelines designed to alleviate the negative impact of violence in telecast material.

SEC. 3. (a) The exemption provided in section 2 shall not apply to any joint discussion, consideration, review, action, or agreement which results in a boycott of any person.

(b) The exemption provided in section 2 shall apply only to activities conducted within 36 months after the date of enactment of this Act.

SEC. 4. This Act may be cited as the "Television Violence Act of 1987."

VI. SECTION-BY-SECTION ANALYSIS

A. Section 1: Grant of Exemption and definitions.

Section 1(a): This section exempts from the antitrust laws the activities set out in section 2.

Section (b)(1): This section defines "antitrust laws" using definitions contained in the Clayton Act (15 U.S.C. 45) and the Federal Trade Commission Act (15 U.S.C. 12).

Section 1(b)(2): This section defines the term "person in the television industry." It designates the parties who will be granted the exemption.

The term "television network" means an organization that produces programs available for simultaneous transmission by 10 or more affiliated broadcast stations and that has distribution facilities or circuits available to such affiliated stations at least 12 hours each day.

The term "any entity which produces programming for television distribution, including theatrical motion pictures," is intended by the committee to be construed broadly to include corporations, partnerships, or sole proprietorships engaged in the production of any type of programming for television.

While the committee chose not to limit the number of persons who may be chosen as designees by the parties covered by the exemptions, it intends that the number of designees be the minimum number reasonably necessary to carry out the activities authorized by the exemption granted by this legislation.

Section 1(b)(3): The term "telecast" means any program broadcast by a television broadcast station or transmitted by a cable television system.

B. Section 2: Definition of activity authorized by the exemption.

This section establishes the activity authorized by the exemption. The antitrust laws shall not apply to any joint discussion, consideration, review, action or agreement by or among persons in the television industry for the purpose of, and limited to, developing and disseminating voluntary guidelines designed to alleviate the negative impact of violence in telecast material.

The committee intends that the parties covered by the exemption be able to undertake all activities necessary to accomplish this end, including the distribution or publication of such voluntary guidelines.

C. Section 3: Boycotts not exempt; 3-year sunset provision.

Section 3(a): This section is similar to language in other Federal statutes that grants antitrust exemptions but excludes joint activity resulting in a boycott. See, e.g., McCarran-Ferguson Act, 15 U.S.C. Section 1011, 10139(b). The term "any other person in such industry" is intended by the committee to be given a broad construction. It includes any person in the television industry, not solely those who are included in the exemption.

Section 3(b): This section provides that the exemption granted by this legislation will apply only to activities conducted within 3 years of enactment.

D. Section 4: Title of the Act.

This section names the Act as the "Television Violence Act of 1987."

VII. EXECUTIVE COMMUNICATION

By letter dated June 25, 1987 from Assistant Attorney General John R. Bolton, the United States Department of Justice expressed its views on S. 844 to the committee.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,
Washington, DC, June 25, 1987.

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This letter responds to the request of Senator Paul Simon for the views of the Department of Justice on S. 844, a bill "to exempt certain activities from provisions of the antitrust laws." This bill would exempt from those laws for a period of 3 years certain joint activities among members of the television industry directed to the impact of violence in television broadcasting. S. 844 is virtually identical to S. 2323, as reported by the committee during the 99th Congress and upon which the committee received the favorable views of the Department in Attorney General Meese's letter of September 25, 1986. The Department continues to support the objectives of this legislation and does not object to this bill from the point of view of antitrust policy.

Legislation to facilitate responsible, private voluntary efforts addressing television violence was revised and refined by the committee in the 99th Congress to produce a narrow antitrust exemption that can promote its purposes effectively without inadvertently affording protection to anticompetitive activities. S. 844 provides that in order to qualify for an antitrust exemption an activity must be "pursuant to the development and dissemination of voluntary guidelines designed to alleviate the negative impact of violence in television broadcasting material" and further that the activity may not result in a boycott of any other person in the television industry. The Department's concerns that an earlier version of this legislation could have been construed in a broad and unintended manner have been addressed; it is apparent that the guidelines to which S. 844 refers are to be truly voluntary and not an anticompetitive tool.

S. 844 differs from S. 2323 as reported by the committee last year only in its extension of the definition of "person in the television industry" to the networks' affiliate organizations. We have no objection to this provision; it is certainly the case that omission of key persons in the television industry whose participation in an effort to address the impact of television violence is necessary or desirable could adversely affect the utility of this legislation.

As stated by Attorney General Meese in his letter to the committee last year, this legislation deals with a major issue that is itself largely unconnected to the proper functioning of an unregulated and competitive economy. Accordingly, the Department supports the goals of S. 844, and has no antitrust objection to the bill.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the President's program.

Sincerely,

JOHN R. BOLTON,
Assistant Attorney General.

VIII. COST ESTIMATE

In accordance with paragraph II(a) of rule XXVI of the Standing Rules of the Senate and Section 403 of the Congressional Budget Act of 1974, the committee provides the following cost estimate prepared by the Congressional Budget Office.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, December 7, 1987.

Hon. JOSEPH R. BIDEN, Jr.
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 844, the Television Violence Act of 1987, as ordered reported by the Senate Committee on the Judiciary, December 3, 1987. We estimate that no cost to the Federal Government or to State or local governments would result from enactment of this bill.

S. 844 would enable television networks and their affiliate organizations, entities that produce television programming, and certain organizations associated with the television industry to meet and consider establishing guidelines restricting the level of violence on television without being subject to antitrust laws. The exemption would be for a period of 3 years, and would not apply to any action that results in a boycott of any person. If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

EDWARD M. GRAMLICH,
Acting Director.

IX. REGULATORY IMPACT STATEMENT

Pursuant to paragraph 11(b) rule XXVI of the Standing Rules of the Senate, the committee has concluded that the Act will have no direct regulatory impact.

X. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the standing rules of the Senate, the committee finds no changes in existing law caused by passage of S. 844.

XI. ADDITIONAL VIEWS OF MR. METZENBAUM

I support S. 844 and agree with the essential points in the committee's report. However, since I have generally opposed creating new antitrust exemptions, I wish to comment separately.

It has long been recognized that certain joint activities among competitors do not reduce competition and, therefore, do not violate the antitrust laws. I do not view S. 844 as creating a new antitrust "exemption" since it cannot reasonably be concluded that the courts today would find the activity covered by the bill to be prohibited by the antitrust laws.

Efforts to develop the type of guidelines covered by the bill would not constitute an antitrust violation for several reasons. First, they would be entirely voluntary. Second, they would deal with matters that have a negligible relationship to competition among broadcasters. Third, the bill makes clear that any anticompetitive use of such guidelines would be fully subject to the antitrust laws.

Despite the absence of antitrust problems which would accompany such efforts, some members of the broadcasting industry have expressed concern that they may be exposed to antitrust liability if they participate in joint efforts to formulate guidelines. In view of this concern and the harm of discouraging efforts which are in the interest of the children of this country, it is appropriate for Congress to enact this narrowly crafted statute. I commend Senator Simon for his leadership in this area and his willingness to respond to any legitimate concerns and suggestions raised about this legislation.

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